Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	CC Docket No. 96-238
Accelerated Docket for	)	
Complaint Proceedings	)	

AMERITECH COMMENTS

Gary L. Phillips
Counsel for Ameritech
1401 H Street, NW
Suite 1020
Washington, DC 20005
(202) 326-3817

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A. INTRODUCTION AND SUMMARY

The Ameritech Operating Companies and Ameritech Communications, Inc. (collectively Ameritech) respectfully submit the following comments in response to the Public Notice (Notice), released December 12, 1997,[1] in which the Common Carrier Bureau (Bureau) seeks comment on alternative complaint adjudication procedures to complement rules recently announced in the Formal Complaint Streamlining Order.[2] The Bureau seeks comment, in particular, on the merits of an accelerated complaint adjudication process that would incorporate what it refers to as a "hearing-type proceeding" or a "minitrial." This alternative process would be administered by the Competition Enforcement Task Force (Task Force).

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[1] Common Carrier Bureau Seeks Comment Regarding Accelerated Docket for Complaint Proceedings, DA 97-2178, CC Docket No. 96-238, released December 12, 1997.

[2] Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, Report and Order, CC Docket No. 96-238, FCC 97-396, released November 25, 1997.

As discussed in more detail below, Ameritech supports the development of a framework that would allow parties, in certain cases, to present witnesses and evidence at some form of hearing. As the Commission suggests, "hearing-type" proceedings can permit closer inquiry into factual issues and more effective credibility determinations than are possible on a paper record. Such proceedings thus have the potential to foster better, more informed decision-making by the Commission.

Ameritech also favors the establishment of procedural rules that will ensure that adjudications incorporating hearing-type proceedings are decided expeditiously. As the Commission noted in the Formal Complaints Streamlining Order, "prompt and effective enforcement of the Act and the Commission's rules is crucial to attaining the 1996 Act's goals of full and fair competition in all telecommunications markets."[3]

Ameritech is concerned, however, by the Bureau's suggestion that all Task Force adjudications be subject to a sixty-day deadline. While a sixty-day cycle may be sufficient for complaints that do not require significant discovery or factual development, it is insufficient time to adjudicate and decide complaints involving disputed facts, and it is certainly too short a deadline for complaints involving facts that are sufficiently complex as to warrant some form of hearing. In most cases, the Task Force could not possibly meet this deadline without

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[3] Id. at para. 1.

raising serious due process and fairness concerns and creating an unacceptable risk of arbitrary and capricious decision-making.

A better approach would be to establish an expedited process that would permit adjudication of complaints involving disputed facts within 90 days, if necessary to meet a statutory deadline, and no more than 120 days in other cases. The guarantee of a decision in 90 to 120 days (a guarantee parties do not have under the new, streamlined formal complaint rules, absent a statutory mandate), would meet the Bureau's objective of establishing an alternative, expedited complaint adjudication process. It would do so, however, without unduly sacrificing fairness and justice at the altar of speed. It would generally afford parties a reasonable amount of time to present their claim or defense, thereby preserving the integrity and reliability of the Commission's decision-making processes in a way that the proposed 60-day deadline could not.[4]

B. THE COMMISSION SHOULD NOT ESTABLISH 60-DAY FOR COMPLAINTS INVOLVING DISPUTED FACTS

As indicated in the Notice, the Bureau's proposed 60-day complaint adjudication process was spawned by the Commission's invitation to staff in the Formal Complaints Streamlining Order "to explore and use alternative

[4] For the most part, the revised deadlines could be met within the context of the rules adopted in the Formal Complaints Streamlining Order, thereby minimizing any confusion that might arise from the establishment of a parallel complaint track. In that decision, the Commission adopted procedures that would permit it to decide complaints in as little as 90 days, though it did not commit itself to decision-making deadlines, except as required by law.

approaches to complaint adjudication designed to ensure the prompt discovery of relevant information and the full and fair resolution of disputes in the most expeditious manner possible."[5] Unfortunately, this proposal is not consistent with that invitation. The Commission encouraged staff to develop alternative procedures that would ensure *"full and fair resolution of disputes* in the most expeditious manner possible," not speed at all costs. An examination of the interim deadlines that would have to be met in order to permit a 60-day decision, however, makes it clear that the Bureau's proposal would not permit the full and fair resolution of disputes. It would deny parties, particularly defendants, a reasonable amount of time in which to prepare and present their case.

Less than two months ago, the Commission adopted the Formal Complaints Streamlining Order, which dramatically reduced deadlines in the formal complaint process to permit resolution of complaints in as little as 90 days. In adopting these revisions, the Commission rejected, time and again, arguments from a variety of parties, that the new deadlines were too ambitious. Specifically, the Commission brushed aside arguments that the expedited procedures would unfairly prejudice smaller carriers, and it rejected arguments that these procedures would be unfair to defendants, who, unlike complainants, would not have the opportunity to "line up all their ducks" before the clock started running. Repeatedly, the Commission stated that the goal of expedited

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[5] Notice at 1, citing Formal Complaints Streamlining Order at para. 5.

decision-making and the imperative of meeting congressional deadlines outweighed these concerns.

At the open meeting in which the Formal Complaint Streamlining Order was adopted, some commissioners acknowledged that the new procedures were untested and indicated that the Commission would carefully monitor their impact and revise them if necessary. The order itself reflects these sentiments.[6] Nevertheless, without the benefit of any experience with the new streamlined rules, the Bureau now proposes to shrink the rules' ambitious deadlines even further and to do so within a framework that purports to provide *greater* opportunities to develop the facts.

This would be a mistake. The procedures adopted in the Formal Complaints Streamlining Order establish extremely tight deadlines that will heavily tax carriers that become party to a complaint. Insofar as they were designed to permit decisions within ninety days, they are *already* expedited. Indeed, they mark a radical departure from past Commission practice in which decisions typically took as much as twelve months, and in many cases, longer. The Commission has yet to demonstrate that it can fairly adjudicate fact-based disputes in as little as 90 days. In proposing a 60-day deadline, the Bureau looks to squeeze blood from a stone.

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[6] Formal Complaints Streamlining Order at para. 4 ("We intend to closely monitor the effectiveness of our new streamlined rules in promoting the pro-competitive goals of the Act. We will not hesitate to re-visit the rules and policies adopted in this Report and Order if we later determine that further modifications are needed to ensure that complaint proceedings are promptly and fairly resolved and, more generally, to promote the Act's goal of full and fair competition in all telecommunications markets.")

The point is best illustrated by examining in detail the implications of a 60-day deadline. In the Notice, the Bureau suggests that, in order to meet this deadline, answers would have to be filed seven days after the complaint, and a status conference would have to take place eight days thereafter. Thus, under the proposed rules, the following would have to take place within 15 days:

- Complainant files its complaint;

- Complainant files up to ten proposed interrogatories and justifications therefor;

- Defendant reviews and analyzes the complaint and all of the documents and affidavits attached thereto (which, it must be assumed, defendant has not seen before, despite pre-filing discussions);

- Defendant files an answer to the complaint, which under the Bureau's proposals would require: (i) making a decision as to what types of documents are "relevant" to or "likely to bear significantly" on any claim or defense; (ii) locating and isolating those documents (a process that, depending upon the nature of the disputed issues, could require manual review of massive numbers of computer records, tapes and/or paper documents, including those that have been archived and are not readily available);[7] (iii) copying or printing all such documents; (iv) identifying confidential and privileged documents and marking them as such; (v) identifying all persons with knowledge of disputed facts and preparing affidavits with those persons; (vi) drafting specific, fact-based responses to all allegations in the complaint, as well as any applicable affirmative defenses; and (vii) drafting proposed findings of fact, conclusions of law and legal analysis relevant to the claims and arguments stated in the answer.

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[7] This is not a mere theoretical concern. Complaints that allege a pattern or practice of behavior, or that state a claim, such as discrimination, that can only be evaluated by comparing the services or elements provided to complainant with those provided to others, could trigger massive document production obligations. Moreover, the documents relevant to such complaints might not be identifiable except through a manual review of even more massive numbers of documents or database records.

- Defendant files proposed interrogatories as well as an explanation of why each interrogatory is necessary to the resolution of the dispute and not available from any other source;

- Defendant answers complainant's interrogatories or states objections to them;

- Complainant answers defendants interrogatories or states objections to them;

- Complainants and defendants meet to discuss settlement prospects, discovery, issues in dispute, and schedules for pleadings, and prepare for submission to the Bureau stipulated facts, disputed facts, and key legal issues;

- Complainants and defendants attend status conference at which schedules are established and discovery decisions are made.

It is questionable whether these steps could generally be completed even in the thirty days allowed under the new streamlined rules.[8] It is inconceivable that they could be completed in half that time. Certainly, they could not be completed in 15 days without unacceptably compromising the integrity and fairness of the Commission's decision-making processes. The proposed rules would be particularly unfair to defendants, which, unlike complainants, would not be able to complete preparation of their case before the initiation of formal proceedings.

Ameritech does not dispute the fact that the Commission has broad discretion to institute expedited complaint procedures. The Commission may

[8] Ameritech notes, in this regard, that discovery has not yet been completed in any of the three formal complaints that Ameritech initiated last summer.

not, however, deny parties a reasonable amount of time in which to prepare and present their case.[9]

To reduce these due process concerns, the Bureau should establish an expedited dispute resolution mechanism that would allow parties the opportunity to avail themselves of hearing-type procedures while obtaining a decision in 90 days, if necessary to meet a statutory deadline and, in no event, more than 120 days. This process, unlike the 60-day process proposed, could further both of the goals identified in the Further Complaint Streamlining Order – accelerated decision-making and the full and fair resolution of disputes. It would guarantee parties an expedited decision - a guarantee they would not otherwise have, unless the complaint was subject to a statutory deadline - and it would do so (assuming appropriate cases were assigned to the Accelerated

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[9] See Katzson Brothers, Inc. v. Environmental Protection Agency, 839 F.2d 1396, 1399 (10th Cir. 1988) ("[A]gencies are free to fashion their own rules of procedure, so long as these rules satisfy the fundamental requirements of fairness and notice."); Cruz v. Sullivan, 802 F. Supp. 1015, 1017 (S.D. N.Y. 1992) ("[F]undamental fairness in administrative proceedings is a prerequisite for judicial recognition of [the]results."); Baires v. INS, 856 F.2d 89, 93 (9th Cir. 1988)(INS decision overturned because agency did not allow asylum seeker's attorney a fair opportunity to prepare his case); Amalgamated Meat Cutters v. NLRB, 663 F.2d 223, 228 (D.C. Cir. 1980) (denying application to enforce NLRB order on ground that "notice gave . . . insufficient time to prepare a defense" after NLRB's theory of the case changed at hearing before ALJ.) See also Martel v. County of Los Angeles, 56 F.3d 993 (9th Cir. 1995) (en banc, Kleinfeld, J., dissenting: "[T]oo much speed as well as too much delay can deny justice. Speed of the litigation process should be managed so that the truth, not the speed, determines the outcome." *Id.* at 1003. "Too much speed reduces reliability, and so produces less just outcomes." *Id.* at 1005) Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process . . . is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice . . . must afford a reasonable time for those interested to make their appearance"); In re Gault, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded"); Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3rd Cir. 1995) ("Due process requires notice that . . . reasonably conveys all the required information, and permits a reasonable time for a response.").

Docket) under terms that would not unduly compromise due process rights and reliable decision-making.[10] In the paragraphs below, in which Ameritech responds to the specific issues raised in the Notice, Ameritech lays out this alternative proposal in more detail.

C. COMMENTS ON SPECIFIC ISSUES RAISED IN NOTICE

1. Need for Accelerated Docket

Paragraph 1 of the Notice seeks comment on "specific events, general industry trends, or particular categories of disputes that might benefit from treatment under the Accelerated Docket." It asks whether the docket initially should be limited to issues of competition in the provision of telecommunications services. It also asks how the FCC can work cooperatively with state utility commissions to ensure that the respective interests of each are protected.

Ameritech submits that it is neither feasible nor desirable to limit the Accelerated Docket to particular subject matters or categories of disputes, such as disputes involving issues of "competition." First, any such limitation would be illusory since virtually all formal complaints raise issues that, on some level, relate to competition. In this regard, even complaints that, at first blush, appear to raise consumer issues, rather than issues of alleged anticompetitive behavior,

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[10] Some complaints may present issues that are so difficult and complex as to not be susceptible to expedited decision-making. The Bureau must be sensitive to those concerns when considering whether to assign a complaint to the Accelerated Docket.

invariably have competitive implications. Second, even if the Bureau were presented with a complaint that did not raise competitive issues, Ameritech sees no reason why such complaint automatically should be relegated to second-class status. An issue that was purely of interest to consumers, and not competitors, for example, is no less deserving of swift Commission attention than a competitive issue.

Just as there is no principled basis upon which the Bureau can limit the Accelerated Docket to complaints raising competitive issues, as opposed to other types of issues, there is no principled basis upon which the Bureau can limit that docket to certain types of competitive issues. Undoubtedly, some commenters will argue that the Accelerated Docket should be available only for complaints alleging conduct that impinges the development of local competition. Jurisdictional issues aside, Ameritech sees no basis for a conclusion that anticompetitive conduct in one market is somehow more deserving of Commission attention than anticompetitive conduct in other markets. If an alleged act impedes competition in any market, it should be addressed in swift and sure fashion. To be sure, competition may be more developed in some markets than in others, but that only means that opportunities for anticompetitive conduct are more limited in some markets than others. It means that conduct that might be anticompetitive in one context (for example, pricing below cost), might not be considered anticompetitive in another. It does not

mean, however, that conduct that actually is anticompetitive in one market is of less concern than anticompetitive conduct in another.

There are also other reasons why the Bureau should not limit these procedures to complaints implicating local competition issues. Even more than the streamlined procedures adopted in the Formal Complaints Streamlining Order, the procedures proposed here (including the revised procedures proposed by Ameritech) mark a radical departure from those used in the past. While the Bureau may anticipate that these procedures will improve its ability to decide complaints quickly and fairly, the Bureau cannot really gauge the impact of these changes until they are tested. Despite what the Commission may have said in the Formal Complaints Streamlining Order, and despite what the Bureau may say in the future in implementing this Notice, there are real questions as to whether the new procedures will be reasonable and fair to all parties and whether they are going to work as intended. More to the point, there are real questions as to whether the very tight deadlines adopted - including those proposed here by Ameritech - will unreasonably and uniquely burden defendants, who do not have the opportunity to complete the preparation of their case before suit is initiated. Given these questions, the Bureau should be especially reluctant to establish skewed procedures that cast one set of carriers (incumbent local exchange) exclusively as defendants and other members of the industry exclusively as complainants. That would not only be unfair, it would render impossible any meaningful dialogue in the future as to how the

procedures are working and how they could be improved. Any such dialogue would become little more than a game of competitive posturing.

For all of these reasons, Ameritech believes that all formal complaints should be potential candidates for the accelerated docket. Moreover, Ameritech sees no reason to leave the choice as to whether to apply for inclusion in that docket entirely to complainants. Defendants, as well, may benefit from the fact-development possibilities offered by a minitrial, and defendants may also have a strong interest in expedited resolution of an issue.

Ultimately, the decision as to which complaints should be accorded expedited treatment and assigned to the Task Force is one that must be left to the discretion of the Bureau and the Task Force itself. That decision cannot be based on some sort of preordained hierarchy among the various types of issues that might be implicated; it must be based on a case-by-case assessment of the costs and benefits of using the expedited procedures. For example, cases involving complex disputed facts, for example, might be prime candidates for Task Force adjudication because of the fact-finding limitations inherent in proceedings conducted entirely on paper. On the other hand, those cases might be so difficult and complex that it would not serve the interest of justice to subject them to expedited deadlines. A case-by-case balancing of these considerations is necessary. Likewise, cases in which a quick decision is especially urgent might appropriately be assigned to the Task Force, even if a hearing does not seem necessary. On the other hand, in cases in which a hearing is unnecessary, it may

be more appropriate to consider a cease order or a cease and desist order in accordance with the procedures adopted in the Formal Complaints Streamlining Order. The point is that there is no reasonable way to "objectify" this decision; it is a judgment that must be based on the overall costs and benefits of proceeding in the Accelerated Docket in light of the alternative procedural options available.

Of course, in order to make this judgment, the Bureau must have sufficient information about the nature of the dispute. In section 4 below, Ameritech offers a proposal to that end. In brief, Ameritech proposes that any prospective complainant that seeks Task Force adjudication of a dispute should, as a prerequisite, be required to participate in brief, informal settlement discussions with the prospective defendant, under the auspices of the Task Force. In the event those discussions are not successful and a complaint is filed, the Task Force would then have the information necessary to determine whether the public interest would be served by adjudicating the complaint in the Accelerated Docket.

The Bureau also asks for suggestions as to how the Commission can work cooperatively with states on enforcement matters. Ameritech believes that the answer is quite simple: follow the law. Under the 1996 Act, the Commission has been given jurisdiction over certain matters; the states have been given jurisdiction over other matters. To the extent that a complaint raises issues that are subject to FCC jurisdiction, the Commission should decide those matters, and if necessary and warranted, preempt conflicting state rules. On the other hand, if

a complaint presents issues over which the states have jurisdiction, the Commission should leave those issues to the states.

In order to ensure comity in federal-state relations, however, it is not enough for the Commission to avoid *deciding* issues that are exclusively within the province of the states. The Commission must also avoid, when possible, *adjudication* of such issues. Unfortunately, an expedited complaint process may result in a full adjudication of the facts before the Commission decides any jurisdictional challenge to the claims. This could not only stress federal-state relations, but lead to a massive waste of resources.[11] To minimize this occurrence, the Bureau should use the pre-filing process to identify claims that raise significant jurisdictional issues and it should not place such claims in an Accelerated Docket unless and until it determines that the Commission does, in fact, have jurisdiction over such claims.

2. Minitrials

Paragraph 2 of the Notice seeks comment on whether an alternative dispute resolution mechanism should include so-called minitrials and, if so, how such hearings should be structured. It suggests, as one possibility, that each party be given a certain amount of time to present its case and cross-examine its opponent's witnesses.

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[11] Particularly in light of the significant resources that would have to be devoted to adjudicating complaints under the expedited time frames envisioned, efficiency and fairness demand that the Task Force resolve jurisdictional questions before assigning a complaint to the Accelerated Docket.

As indicated above, Ameritech supports the use of minitrials in Task Force proceedings. Giving parties an opportunity to flesh out contested facts in a way that is not possible in paper proceedings should significantly enhance the Commission's ability to decide difficult cases. To this end, Ameritech finds acceptable the Bureau's proposal to allot each party equal time and to allow parties to use their allotted time as they see fit - either in direct, cross, or redirect examination, although Ameritech believes that the interests of justice may require flexibility in this regard.[12]

On the other hand, if minitrials are to fulfill their potential as agents for better decision-making, they must be incorporated into a complaint process that gives complainants and defendants adequate time and opportunity to prepare their respective cases. Simply cramming a minitrial into an overly compressed schedule will not add significant value to the complaint process; the hearings themselves would be compromised by the lack of adequate time to prepare, and the quality of the paper pleadings would likewise suffer. As Ameritech argues above, the public interest would be far better served if the Bureau took a little more time to ensure good decision-making.

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[12] See McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990) (criticizing district court's use of clocking method during trial, since "to impose arbitrary limitations [and] enforce them inflexibly . . . is to sacrifice too much of one good - accuracy of factual determinations - to obtain another - minimization of the time and expense of litigation"); Flaminio v. Honda Motor Co., 733 F.2d 463, 473 (7th Cir. 1984) (While district judges may set "reasonable deadlines . . . we disapprove of the practice of placing rigid hour limits on a trial. The effect is to engender an unhealthy preoccupation with the clock").

One requirement that could be especially useful in enhancing the utility of minitrials would be to require parties to file pre-trial testimony at least seven days prior to the minitrial if they plan to present material evidence not previously disclosed in their initial pleadings. Although the pleading rules adopted in the Formal Complaints Streamlining Order are designed to prevent these kinds of surprises, those rules permit parties to submit evidence or information not included in their initial pleading if they explain its relevance and why it was not previously disclosed. To the extent parties intend to submit new evidence at a hearing, however, the other party should receive advance notice so that it has adequate time to consider that evidence and prepare a response. This would allow for a more focused and efficient hearing and would also prevent parties from gaming the hearing by holding back certain claims or arguments until that time.

It is also imperative - particularly in the context of an expedited schedule - that the Bureau establish ground rules to ensure that minitrials are conducted efficiently, fairly, and in a consistent manner. Under section 1.351 *et seq.* of the Commission's rules, the federal rules of evidence for civil non-jury trials apply to FCC formal hearings. Insofar as the Bureau envisions "hearing-type proceedings" and not full-fledged hearings, it would be inappropriate and unnecessarily formalistic for this rule to apply to the proposed minitrials. Nevertheless, at a minimum, the Bureau must take steps to ensure that minitrials are not used to conduct fishing expeditions. All testimony must be limited to

matters relevant to the disputed facts. Testimony that strays from the issues in dispute should be stricken. Likewise, parties should be prohibited from engaging in cross-examination as to matters that are beyond the scope of the witnesses' direct testimony. To this end, the Bureau should clarify that the following federal rules of evidence will apply to minitrials: Rule 401 (which defines "relevant evidence"); Rules 402 and 403 (which provide that irrelevant evidence is inadmissible and that relevant evidence is generally admissible, except if its probative value is outweighed by the danger or unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence); and Rule 611(b) (which generally limits cross-examination to the subject matter of the direct examination and matters affecting the credibility of the witness). Counsel should be permitted to object, as necessary, to ensure that these rules are enforced.

3. Discovery

Paragraph 3 of the Notice seeks comment on how best to allow for discovery in a 60-day complaint process. The Bureau seeks comment, in particular, on whether parties should submit all discovery requests and disputes to the Task Force in advance of the initial status conference. It also seeks comment on whether parties should be required to exchange all documents relevant to the issues raised in the complaint and answer either when they file their initial pleadings or at some other point before the initial status conference.

It asks, in the alternative, whether it should mirror the requirement of the United States District Court for the Eastern District of Texas that parties exchange all documents "that are likely to bear significantly" on any claim or defense. In addition, the Bureau seeks comment on sanctions for violating discovery orders of the Task Force.

For the reasons discussed above, Ameritech does not believe it possible to allow for discovery, other than limited interrogatories, in a sixty-day complaint process. While sixty days may be sufficient time to resolve complaints in which the critical facts are not in dispute, it is not enough time for complaints in which significant discovery, including document production, is necessary. On the contrary, experience demonstrates that, even with mandatory disclosure rules in place, discovery consumes extensive resources and requires significant time.

The American Bar Association recently completely a survey of members of its Litigation Section regarding the mandatory disclosure requirements of FRCP 26(a)(1),[13] which took effect in December 1993.[14] The survey found that Rule 26(a)(1) had not had a significant impact on federal civil litigation and that, to the extent it had any measurable effects, most were negative.[15] More significantly, the survey found that the rule had not reduced discovery costs or

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[13] Rule 26(a) requires parties, without waiting for a discovery request, to identify individuals likely to have discoverable information, and to provide or describe documents that are relevant to disputed facts.

[14] "Mandatory Disclosure Survey: Federal Rule 26(a)(1) After One Year," Section of Litigation, American Bar Association, Committee on Pretrial Practice and Discovery, Report of the Subcommittee on Mandatory Prediscovery Disclosure Rules April 1996.

[15] Id., Executive Summary at 1.

delays and that it provided one more mechanism for parties to use as a tactical weapon. In fact, more than half of the survey respondents who participated in cases in which FRCP 26(a)(1) was followed experienced disputes with their opponents regarding the disclosure obligation itself.[16] A substantial majority of those surveyed voiced strong opposition to mandatory disclosure and roughly three quarters said that Rule 26(a)(1) should not be continued.

To be sure, as the Commission points out in the Formal Complaints Streamlining Order, the fact that the FCC does not permit notice pleading alleviates some of the concerns with applying mandatory disclosure in Commission proceedings. Certainly, the Commission's rigorous pleading requirements make it easier for parties to identify "relevant" information. Nevertheless, this difference in pleading requirements does not address all of the problems that have been experienced with mandatory disclosure in federal courts. Simply put, mandatory disclosure is not the panacea the Bureau seeks and requires in order to be able to accommodate document production in the context of a sixty day complaint process. In fact, in a number of respects, the two mandatory disclosure proposals described in the Notice would aggravate problems that have been associated with Rule 26(a) and that are likely to occur under the mandatory disclosure requirements adopted in the Formal Complaints Streamlining Order. Neither of these proposals should be adopted in their current form, regardless of whether the Bureau sticks to a 60-day deadline or a

different, more reasonable expedited schedule. Ameritech addresses these proposals, in turn, below.

One of the Bureau's proposals is to require parties to produce with, or shortly after, their initial pleadings, all documents "relevant" to issues raised in the pleadings. One problem with this proposal - a problem inherent, as well, in Rule 26(a) and the new formal complaint rules - is that it requires each party to speculate as to what the other party would view as "relevant" information. Although the Formal Complaints Streamlining Order dismisses such concerns in light of the differences between FCC and federal court pleading requirements, it is Ameritech's experience that discovery requests in FCC proceedings are routinely opposed on the ground that they seek irrelevant information. This opposition is undoubtedly due, in part, to gamesmanship, but it also reflects the fact that parties frequently disagree as to what information is relevant or what is not. Indeed, cases are frequently won or lost based on such determinations. Leaving it to opposing counsel to decide what information is relevant is thus not likely to produce satisfactory results for either side.

Another problem with this proposal - one that does not exist under Rule 26(a) or the new, streamlined rules - is that it would likely lead to the production of too much information. In many cases, parties will "play it safe" and produce every document that is even remotely relevant to the issues raised in the proceeding. They will also produce evidence that is cumulative. That is, after

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[16] Id. at 30.

all, what the rule, on its face, requires. Indeed, parties may see a benefit to that type of excessive disclosure. They may intentionally bombard their opponents with documents simply to overburden them and to obscure the small amount of information that actually is most relevant. Regardless of motives, the volume of documents produced might well be unmanageable in the context of an expedited proceeding.

These are significant problems, but they are only the tip of the iceberg. There are at least three other reasons why this proposal would be extremely problematic - more problematic than FRCP 26(a) and more problematic than the mandatory disclosure provisions of the new streamlined rules.

First, neither FRCP 26(a) nor the mandatory disclosure requirements adopted in the Formal Complaints Streamlining Order requires parties actually to produce all relevant documents; they need only describe them. To the extent that there are large numbers of relevant documents, a determination can thus be made as to which should be produced and which need not be produced. There is a process to balance the benefits and burdens of discovery.

In contrast, the Bureau's proposal would eliminate that process. Parties would be required to produce *all* relevant documents, regardless of the burdens involved and regardless of how relevant those documents were.

This is not an insignificant concern. The number of documents that are at least marginally relevant in a proceeding can be in the tens of thousands. There

must be a process by which the burdens of document production can be controlled.

Second, neither federal cases nor cases outside the ambit of the Task Force are subject to 60-day deadlines. Indeed, the Formal Complaints Streamlining Order does not establish any deadlines for resolving formal complaints that are not subject to statutory deadlines. Thus, to the extent that mandatory disclosure in these other contexts causes problems, there is usually time to consider motions to address those problems and to allow additional discovery. That would not be the case here, particularly if the Bureau sought to resolve all complaints within 60 days.

Third, disclosure under Rule 26(a) is not generally required of defendants until 115 days after the complaint has been served.[17] Under the new streamlined rules, disclosure obligations must be fulfilled at the time the answer is filed - twenty days after the filing of the complaint. In contrast, the more onerous disclosure the Bureau now proposes would have to be completed at the time of or shortly after initial pleadings - that is, no more than a week or so after the filing of the complaint. Ameritech does not see how parties could possibly be asked to identify, much less produce, *all* relevant documents under such short time frames. Even those with the best of intentions would presumably miss relevant information, and, even assuming that any omissions came to light, the

[17] Rule 26(a) provides that disclosure must take place no later than ten days after a Rule 26(f) conference. The Rule 26(f) conference must be held at least 14 days before a Rule 16 conference or the issuance of a Rule 16 order. The Rule 16 conference or order is due no more than 120 days after service of the complaint.

Bureau would be hard-pressed to impose sanctions, given the scant time allotted for disclosure.

The Bureau's alternative proposal – to require production only of documents that "are likely to bear significantly on any claim or defense" - would address some of these problems, but it would only magnify others. For one thing, the operative standard under this proposal is so vague as to be virtually unenforceable. Apart from the obvious "smoking gun," parties are likely to have wildly different notions of what documents "are likely to bear significantly" on disputed issues. The fact that it would be up to opposing counsel to apply this subjective standard only makes this ambiguity more problematic.

One of the reasons this ambiguity is so problematic is that it places counsel in the awkward position of having to determine what arguments (and consequently, which documents) are most damaging to his/her client's case. This is anathema to our adversarial system of justice insofar as it asks counsel to assume responsibilities that ought to be the prerogative of opposing counsel. It is also at odds with attorney-client and attorney work product privileges insofar as an attorney's understanding of the case is necessarily going to be the product of communications with the client and his/her own work on behalf of the client.

Because both of the Bureau's proposals are, at some level, unworkable, they should be modified. Although Ameritech would prefer that the Commission abandon mandatory disclosure altogether, in recognition of the fact